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Model heads of terms for seaport concession PPP agreement

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1. Introduction

These Heads of Terms (“HoT”) are designed as a simple introduction to a typical Concession/PPP Agreement for a concession-based PPP port project. They assume that a “BOT” (build-operate-transfer) PPP structure is used for the project, as this is arguably the most common structure selected by governments for projects of this kind, and the one with the oldest historical pedigree. It is the most familiar, in other words. The Concessionaire is given full rights and obligations to finance, design, build, operate, maintain and commercially exploit the Project throughout the term of the agreement, essentially at its own cost and risk, and then transfer it back to the Contracting Authority, at the end of the Term, as a complete, functioning facility in good condition.

This package of rights and obligations is sometimes referred to as the “Concession” and reflects the basic “trade-off” between public and private sectors in a PPP structure of this type; the former gets a fully functioning port facility, built and operated to the requisite standards, from which the country benefits, without having to fund it; the latter gets its commercial and employment opportunities and investment returns under a long-term contract. And the public gets new, improved infrastructure as a result.

The HoT assume that the Concessionaire has a relatively high degree of autonomy over its activities, and that its revenues will be derived from direct charges to users of the port, rather than from a government payment stream. (This is effectively the definition of a “Concession” in many jurisdictions). They assume that the whole port will be comprised within the “Concession” and that the project will involve a “greenfield” development, or at least a significant portion of design and construction of permanent new structures. Some port concessions are more limited than this, with the conceding of only certain aspects of the port’s infrastructure within an existing facility, and perhaps the installation of temporary structures and equipment which may have to be removed at the end of the concession term. A number of provisions of the agreement would have to be modified to allow for the latter, although many other clauses would still apply in much the same form.

The HoT are intended to give readers a clear idea of the typical practical and commercial contents of a Concession Agreement of this type, with much of the difficult legal terminology removed. It is designed to be used with relative ease by lawyers and non-lawyers alike, to focus discussion on the project’s structural elements and risk allocation, and the respective responsibilities of the parties. Set out below is a short clause-by-clause introduction to its provisions,

together with a summary of some of the issues they typically give rise to.

(A) Parties

The agreement would normally have just two parties, the public and private partners respectively, here called the “Contracting Authority” and the “Concessionaire” – the one awarding and supervising the PPP, and the other implementing and managing it. Occasionally, other parties may also need to be bound in to the agreement, such as another public authority with important powers or responsibilities in relation to the project (e.g., a port regulator, perhaps, or a national government where an element of government guarantee is required) or a parent company of the SPV (special purpose vehicle) for the purposes of certain provisions, such as development phase responsibilities. This is unusual, however. The usual arrangement is to conclude the agreement simply between the two principal parties.

(B) Recitals

The common law practice is to set out a short summary of the background to the agreement in a number of “recitals”, bringing out some of its more important aspects, such as the Contracting Authority’s overall objectives in awarding it, the use of a competitive tendering process, the nature and outline scope of the PPP (e.g., a BOT structure), critical governing pieces of legislation (such as a PPP Law or Ports Act) and perhaps certain central commercial features. Many civil law jurisdictions, however, do not bother with recitals, and simply plunge straight into the agreement’s clauses.

(C) Terms and conditions

1. Definitions and interpretation

Essentially all the agreement’s defined terms will be set out here. The HoT only summarises some of the principal ones, which are used elsewhere in the document. The full-length agreement will often run to three or four times their number (because of all the subsidiary definitions needed to support the main ones). Perhaps the only terms that need to be mentioned at this stage are:

(i) The “Contracted Assets”. These are in essence all the assets comprised in the Port which the Concessionaire is contractually obliged to finance, design, construct, operate, maintain and then hand back to the Contracting Authority at the end of the Term. They are likely to be listed in an appendix to the agreement. This is necessary to give legal and

practical precision to the meaning of the term the “Port”, which is itself only loosely defined as the port the subject matter of the Concession.

Note that many civil law countries sub-divide the Concession assets as a matter of law into three distinct categories; namely, those which are necessary for its performance and become the immediate property of the Contracting Authority; those which may be useful to it, and can eventually be purchased by the Contracting Authority; and those which remain the Concessionaire’s property and must be removed at the end of the Term. (If the Concession is a purely “temporary” – see above – all the Concessionaire’s assets may fall into this last category). Common law agreements sometimes reach much the same result, but by means of lists in the agreement’s appendices. The Contracted Assets cover the first category.

(ii) The “Project” in simple terms means everything the Concessionaire is obliged to do under the Agreement.

(iii) The “Detailed Project Report” or DPR. This is the critical “control document” which will set out the design, construction, maintenance and operational standards with which the Concessionaire has to comply throughout the Term. They will include the “Key Performance Indicators”. It may also list the Contracted Assets and set out certain other key commercial parameters. In familiar PPP language, it will be the “Output Specification” defining what the Concessionaire will have to do and to what standards in technical terms. Ideally, it will be complete by the time the agreement is signed. Sometimes, however, it can only be finalised during the Development Period, once a certain amount of basic design work has been done and other critical aspects of the project have been established. It would then be initialed by the parties and inserted into the Concession Agreement. These “deferred provisions” are not ideal from a contractual perspective, but a DPR mechanism can offer a helpful “fallback” device for including them post-signature.

2. Term and effectiveness

The agreement takes effect on signature, although most of its clauses will remain “suspended” and conditional until satisfaction of the conditions precedent (“CPs”. see Clause 4). This is because both parties will usually have certain responsibilities to perform relating to the CPs and their satisfaction, a process which may take some months and may involve significant work and expense. They may both want the right to bring proceedings where one party fails to do what is expected of it and so effectively thwarts the implementation of the Concession.

The Clause also provides for the term of the Concession (“Term”) to be specified-usually whatever period is necessary for the Concessionaire to repay its lenders and achieve an appropriate return for itself and its investors. Certain other factors, such as the useful life of the underlying assets, the time period for their depreciation and the need to avoid tying up valuable infrastructure in private-sector monopolies or quasi-monopolies, will also weigh heavily in this determination. These will not be brought out in the agreement itself, though, which will usually simply specify the period that results. That period will then often be extendable in certain circumstances, such as to allow for the compensation mechanism where unforeseen events occur, or by agreement between the parties. (The assumption is that the Contracting Authority would usually be reluctant to agree to an extension except for very good reasons). There may also be statutory restrictions on such an extension in the governing PPP law, to safeguard against abuse.

3. Grant of concession

This Clause (in sub-clause 1) formally “grants” the Concession to the Concessionaire, and defines its scope in legal terms. This is often done in more detailed terms than those set out in the HoT. Traditionally, the provision states that the Concessionaire must perform its responsibilities, “and do all things necessary in connection therewith”, at its own cost and risk, save where the agreement specifically provides otherwise. This amounts to a clear, fundamental imposition of risk on the Concessionaire. It is therefore basically up to him to ensure it succeeds. The starting point with a PPP is often a wholesale transfer of risk to the private partner, with the Contracting Authority retaining only those specific risks and responsibilities which it is best able to bear to make the PPP work optimally.

Sub-clause 2 mentions the Concessionaire’s obligation to transfer the assets comprised in the Concession back to the Contracting Authority, at the end of the agreement’s term, in a fit state for their further use for a given period of years. How long that period lasts will be a matter of commercial negotiation for the parties. Sub-clause 3 confirms the exclusive nature of the Concessionaire’s rights in relation to the Port. The Contracting Authority cannot award competing rights to develop it to another private sector entity. (That should usually amount to a contractual “statement of the obvious”. The more difficult question is what restrictions, if any, are to be placed on the development of competing facilities further afield. See further below.)

4. Conditions precedent

This sets out the conditions precedent which have to be satisfied before most of the Concessionaire's practical obligations under the agreement can take effect, in particular to design, build and operate the Contracted Assets, and the numerous responsibilities connected with them. Most of them should be self-explanatory. They include such matters as the acquisition of the Site by the Contracting Authority, its clearance of obstacles and unnecessary structures and hand-over to the Concessionaire with "Vacant Possession" (i.e., free of any third-party claims), the obtaining of all permits and consents needed at this stage to proceed, and perhaps the granting of a formal lease of the Site to the Concessionaire coterminous with the Concession Agreement (which may or may not be a legal requirement in the jurisdiction in question).

The draft also allows for some more unusual CPs in square brackets, on the assumption that the Agreement may have been signed at a very early stage of the development process, such as the addition of a suitable port operator as JV partner, the carrying out of further feasibility and even due diligence studies, finalisation of the DPR (see above), any formal ratifications or government approvals needed for enforceability purposes, and even the raising of additional development funding. A performance bond may have to be provided by the Concessionaire (or perhaps the main contractor's bond transferred) to the Contracting Authority. All the main Project Contracts will then need to have been signed, and Financial Close under the Financing Documents achieved. The remaining clauses of the agreement can then become effective.

The Clause then provides that both parties must endeavour/use reasonable endeavours to satisfy the CPs within the scope of their respective responsibilities. (These may have to be spelled out in an appendix to avoid doubt or argument). In practice, of course, most of the "heavy lifting" tasks in this context will be down to the Concessionaire. It also allows for a "long stop" (or "drop dead") date (say 6, 12 or 18 months after signature), after which the Agreement can be terminated by either party if the CPs have still not been satisfied in full. The Concessionaire may in those circumstances seek to recover some or all of its development costs (as defined) where it is not itself at fault; the draft provides for this, although in square brackets, as it is relatively unusual. Any such right is likely to be heavily negotiated.

5. Covenants – general and preliminary

This Clause sets out some of the more general/preliminary responsibilities of the parties. Since the Concessionaire's obligations are detailed throughout the rest of the agreement, the Contracting Authority's feature more prominently here. They include helping to obtain any necessary formal approvals, acquiring and clearing the Site and handing it over to the Concessionaire with Vacant Possession, acquiring-in time-any additional land identified in the DPR needed for subsequent phases of the Project (if any), prohibitions against granting security interests in the Site or Contracted Assets (which it is likely to own from the outset under a BOT arrangement) to third parties and against any nationalisation of the Project assets or take-over or abrogation of the Concessionaire's rights (except with full compensation). The Contracting Authority will sometimes also be responsible for carrying out a full dredging of the sailing channel into the port, and subsequently maintaining it.

The Clause also includes providing reasonable assistance with the implementation of the Project (e.g., by supplying relevant information or dealing with other relevant authorities) and not interfering with the Concessionaire's activities, except where specifically permitted to do so by the agreement's terms. Note, though, that in most civil law jurisdictions, the Contracting Authority has a general legal power to vary or modify the Concession, where necessary to safeguard the public assets and/or public services involved. Where this power is exercised, the Concessionaire also has a legal right to be properly compensated. It usually makes sense to include express clauses in the agreement which reflect and give effect to these rights and powers, rather than simply leaving them to the general law. This is addressed in sub-clause 5.1(i). A "non-interference" provision would have to be read as being subject to them.

The Clause then summarises the Concessionaire's main obligations under the agreement, allowing at the same time for the possibility of implementing subsequent Phases (if there are any) of the Project, as they may come to be detailed in the DPR. If a firm phasing arrangement has been agreed upon from the outset, it would be appropriate to spell this out in appropriate detail in the agreement when it is first signed.

6. Statutory obligations and entitlements of the parties

This deals with some general legal matters. Both parties are obliged to act at all times in accordance with all Applicable Laws (i.e. domestic laws). The completed Port must also comply with them. The Concessionaire has to discharge its practical responsibilities in accordance with “Good Industry Practice”, meaning that level of skill, care, diligence and foresight reasonably to be expected of a skilled and experienced international company performing the same responsibilities, to the standards specified in the agreement. In simple terms, this means in accordance with “best international practice” – a standard contracting authorities are typically keen to apply.

Allowance is made for the possibility of certain tax and duty exemptions, or a Duty Free Zone, from which the Project may benefit. These may need to be detailed in the agreement if they represent firm commitments. The Clause then gives the Concessionaire full control over its financing arrangements. Contracting Authorities may (sometimes unhelpfully) try to impose approval rights over them, but in the end finance is primarily the Concessionaire’s responsibility under this structure. The draft also allows it to create whatever security interests over its rights and assets that local law permits; the scope and effectiveness of this power can prove awkward in some jurisdictions and would need to be carefully examined with local counsel.

7. Regulatory framework

Specific provisions may need to be included in the agreement for the host country’s port regulatory regime – e.g., in relation to certain operational matters or charges, or where revisions to that regime are known to be imminent. A placeholder is included here to allow for them.

8. Development period

This Clause specifies more of the Parties’ respective obligations during the Development Period (that is, between signature and Financial Close). The Contracting Authority has to provide copies of all records and studies in its possession relating to the Project and assist the Concessionaire to obtain relevant permits and consents. (These may include certain identified permits for which the former is specifically responsible). The Concessionaire is, of course, in turn responsible for all detailed designs and specifications, the production of which is likely to start during the Development Period (to finalise the DPR). The Concessionaire must appoint the EPC Contractor, and perhaps a separate Design Engineer (unless the

former is a “turnkey” contractor). Copies of all designs have to be supplied to the Contracting Authority, who can question and comment on them, but is not necessarily given a formal rights of approval.

The Clause also spells out some of the agreement’s land-related provisions. Title to all the land comprised in the Site remains with the Contracting Authority (as it is a “BOT” arrangement). This extends to any “Reclaimed Land” acquired during the Project (that is, extensions of the shoreline created as the port structures are built). The Concessionaire has full control over (and if necessary a lease of) the Site during the Term, and can sub-lease and sub-license any parts of its occupation and use for the purposes of the Project to third parties, to which the Contracting Authority can raise reasonable objections. No part of it can be leased by the Contracting Authority to anyone else. The Contracting Authority may also have an obligation to acquire any further areas of land identified in the DPR that may be needed for subsequent Phases of the Project.

The Contracting Authority is also responsible for arranging and providing the Transport Infrastructure and Utility Linkages to the Site. These are the road and perhaps rail and/or canal linkages with the hinterland necessary for transport of materials, goods and people to and from the Port, and the utility connections (e.g., power, gas, water) necessary for it to function. The assumption is that these will be substantially in place by the time construction gets underway on Site. If not, the draft entitles the Concessionaire to an extension of time for completion.

9. Concessionaire corporate structure

This can be a sensitive area, as the Concessionaire will usually want to maximise its autonomous control over its shareholders, while the Contracting Authority has a legitimate interest in at least knowing who they are and ensuring that the company it has selected for the role remains fully committed to it. The draft assumes that the Concessionaire will be a locally incorporated SPV (as it usually is). It allows the Concessionaire to change its shareholdings or their structure, but must notify the Contracting Authority accordingly; the latter only has the rights of approval (if any) it is specifically given by the agreement. These are likely to have to be negotiated. The Concessionaire undertakes, for example, that no shares will be sold to a third party to which the latter has a reasonable objection on grounds of national security. A mechanism is also included to prevent the disposal of a “key shareholder” (as identified) without the Contracting Authority’s consent, at least for a specified period of years. As the Concessionaire is an SPV, it cannot engage in any activities unrelated to the Project.

10. Design and construction

The draft allows a construction period to be inserted (36 months is assumed, as so often!), subject to any extensions granted in accordance with the agreement. The Concessionaire is responsible for all the Project's works of design and construction, which must be carried out in the time and manner required by the agreement. The completed works must be fully in accordance with the DPR, the Contract Documents and standards and the final detailed design. The Concessionaire must submit a detailed programme to the Contracting Authority, showing how the completion date will be met, but this is usually not made contractually binding on him. A clear completion date should be sufficient as a binding deadline, given his incentives to complete and the need to manage his risks.

The Concessionaire is deemed to have made all necessary investigations into the nature and quantities of the works before starting, including site investigations, subject to an exception for difficulties not reasonably foreseeable at the Effective Date, including site contamination and archaeological and historical finds. (Both these risks usually absorb much attention before the project is "let"). It is entitled to extensions of the time for completion for events beyond its reasonable control (force majeure) and Change of Law, but if it fails to complete the works by the due date (as extended) it may be liable for liquidated damages, at a rate to be specified, and a call may be made on any performance bond it has provided. Ultimately, the agreement may also be terminated in these circumstances. Note that concession agreements may or may not provide for liquidated damages or, as explained, a performance bond; arguably, the Contracting Authority will not actually suffer any loss from late completion, while the Concessionaire ultimately stands to lose everything if it fails to complete a functioning project. Its incentive to complete on time is strong anyway, in other words, and will be reinforced by the terms of its loan agreements in a project-finance structure.

The draft provides for inspections and monitoring of the works by the Contracting Authority, subject to reasonableness tests and limitations, and a site office which it can use. The Concessionaire has to provide regular reports and data on progress to it. The Concessionaire can subcontract all its design and construction responsibilities in the usual way, keeping the Contracting Authority informed of the identity and credentials of any material subcontractors (as defined – e.g., costing at least US\$ 0.5m pa). Contracting Authorities often seek rights of control and approval over subcontractors, but in general terms this is not appropriate, as it would interfere with the Concessionaire's need to manage the works for

which it is responsible as it thinks best. A compromise mechanism suggested by the draft might be to allow the former to raise reasonable objections to material subcontractors – e.g., on grounds of national security.

All design and construction works must be carried out in accordance with Good Industry Practice. This standard will effectively apply to everything the Concessionaire does and all its methods of working. But the draft also allows for a number of specific matters of detail to be set out if required, such as conditions on Site, the use of local labour and materials, compliance with employment laws, health and safety, environmental standards and so on.

When the construction works are sufficiently complete for the Port to become operational, a compliance inspection takes place, allowing the Contracting Authority to attend the completion procedures and tests, and review the relevant reports and certificates, etc. (on which it must rely except in the case of manifest error; there is no point in inviting it to re-open the completion procedures under the EPC Contract). At the earliest practicable date thereafter, the Operational Port Declaration – that is, the formal document allowing the facility to be opened as a functioning port – is issued. This may be before the whole of the works are substantially complete; the latter is governed by a separate Completion Certificate. The issue of an effective OPD following completion is the Contracting Authority's responsibility.

11. Ownership of contracted assets

The party owning the Contracted Assets during the Term is specified in the agreement for the avoidance of doubt. This may not be necessary where the applicable legal regime leaves no room for doubt on this point, as in many civil law jurisdictions. In common law jurisdictions, ownership of the assets would usually follow ownership of the land to which they are permanently affixed. This may or may not be the case in civil law ones. Whoever owns them, the Concessionaire must clearly have full right to operate, maintain, repair and replace them throughout the Term. The Concessionaire's right to grant security over the Contracted Assets and all its other rights and interests under the agreement is confirmed by the next sub-clause. This may raise technical legal issues which should be discussed with local counsel, but it is obviously a critical matter for the bankability of the Project.

12. Operations

This Clause sets out a number of general and specific provisions which apply to the Concessionaire's operation of the Port. from the Date of Commencement of Operations. It is entitled and obliged to manage, operate, maintain and commercially exploit the Contracted Assets and the Port and provide the Services (which will be itemised in an annex) in accordance with the agreement's requirements throughout the Operational Period. It has a high degree of autonomy as to how exactly it plans and organises its activities and carries them into effect, over its "operational regime", in other words. The Clause allows any specific activities which the parties feel should be spelled out to be itemised here. A number of the Concessionaire's obligations in this context are listed.

The Operating Procedures governing the operation of the Port and provision of the Services have to be notified and published, and are subject to the Contracting Authority's reasonable comments. Long-term commercial contracts, leases and licenses with third-party users of the Contracted Assets or the Port can be entered into, provided they are consistent with the agreement's terms. All the Services can be subcontracted by the Concessionaire (who remains fully liable for the performance of its subcontractors in the usual way).

The possibility of Priority Services by the Concessionaire being mandated by the government is allowed for. These are specific port services which have to take priority in a national emergency or catastrophe, on the basis of an indemnity against any Concessionaire losses. The Concessionaire has full control over its appointment of staff at the Site, although a "local content" provision is also included (up to a stated percentage of total staff), as contracting authorities often require one. Site security and maintenance standards are addressed, as are communications, formal "interfacing", reporting and information provision between the parties. The Contracting Authority undertakes to provide the Concessionaire with reasonable assistance when required in relation to its activities. As mentioned above, it may also be responsible for dredging and maintaining berth depths and waterway access to them.

Contracting Authority "step-in rights" are also provided for. These effectively allow it or the government to take over the operation of the Port (in whole or part) for reasons of national security or a national emergency which the Concessionaire is unable to deal with. The difference with Priority Services is that the Concessionaire has to provide the latter, while step-in

rights involve bringing in a third-party entity to operate the Port. The Contracting Authority must account to the Concessionaire for any revenues received during the step-in period, which must come to an end as soon as practicable after the events giving rise to it have ceased to apply. The Concessionaire can treat the step-in as an event of political force majeure if it is not itself at fault, and terminate the agreement after a given period if not reinstated as operator.

13. Commercial matters

This Clause provides for the commercial aspects of the Port's operation by the Concessionaire. Regular usage/traffic reports have to be provided to the Contracting Authority. The Concessionaire has the right and obligation to charge and collect all tariffs and other charges in accordance with local law and the provisions of the agreement. Its freedom to set tariffs at a level it chooses will be a matter of both the applicable regulatory regime and negotiation with the Contracting Authority. (The word "set" is therefore in square brackets). In civil law countries, the tariffs usually have to be closely regulated – usually on a cost-plus-reasonable-remuneration basis – as a public service is involved. Even where this is not the case, the Contracting Authority may wish to impose constraints and controls in the contract. Conversely, somewhat unusually, it may be content simply to let market principles apply and allow the Concessionaire to determine them.

Whichever approach is adopted, the tariffs have to be non-discriminatory and published. The draft distinguishes between tariffs for port services and other types of commercial charge (e.g., warehouse rents) which are likely to fall outside any regulatory constraints. The Clause also allows for the possibility of a concession fee and/or "sovereign tariffs" (public sector dues) which are payable to the Contracting Authority, providing it with a certain revenue stream from the Concession. These may or not apply. They would need to be feasible and reasonable in the context of the Concessionaire's wider commercial and financial structure.

The draft allows for the possible inclusion of an element of government guarantee in order to make Project bankable, if this is necessary. A full guarantee of all the financing is unlikely to be either necessary or appropriate on a typical PPP structure. Partial revenue guarantees, on the other hand, are far from unknown in challenging emerging markets, especially where the creation of the port is a government initiative and there are uncertainties about its full commercial potential. The draft contains a "placeholder" for provisions of this kind.

The draft also allows for the future upgrading of the Port by adding further Contracted Assets, which require the Contracting Authority's approval above a certain value. The possible future expansion of the Port is also addressed, either to implement further Phases as envisaged in the DPR, or – perhaps more contentiously – where the Concessionaire deems it feasible. Any conditions and tests or other constraints applicable to such expansion will be a matter for negotiation.

Another possible provision envisaged by the draft which is likely to be highly contentious is the limit on the development by the Contracting Authority (or government) of competing ports, at least within a certain geographical range of the Concession Port. Many government bodies would consider this an unacceptable restraint on their statutory powers and duties; but something like it may be considered essential by investors and lenders.

Finally, the possibility of a performance bond or bonds to cover the Concessionaire's construction and operational obligations and performance standards is allowed for, but in square brackets, as it is arguably commercially pointless and a superfluous project cost. A bond is often required, nevertheless. During the design and construction phase, the obligation may be discharged by assigning the EPC Contractor's bond to the Contracting Authority.

14. Change in law

This Clause sets out the protections – critical in most concession agreements – against changes in law adversely impacting the Concessionaire. It does not of course offer relief for any changes in law of any kind; only for “qualifying” ones, as defined. The exact components of the definition will require careful thought and negotiation. The practice now is to make such protections very limited in OECD countries. But they can still be broad in emerging market ones, where there may be much greater uncertainty about future legal and political changes. The draft suggests some typical language, allowing *inter alia* for the possibility of a financial threshold.

Where the applicable tests are met, the procedure in sub-clause 2 for invoking the provision is then applied. Two possible consequences can follow: either compensation under Clause 15, or outright termination of the agreement by the Concessionaire if it is left unable to enjoy/perform its material rights/obligations by the Qualifying Change in Law and is deprived of at least a substantial part of the benefit of the Concession as a result.

15. Force majeure and compensation

Protections for unforeseeable events beyond a party's reasonable control are also generally regarded as crucial elements of concession agreements. They are sometimes called “exceptional” or “special” events, and sometimes simply force majeure. Their substance is much the same. Their definition – which can be heavily negotiated – will consist primarily of a list of specific events which can trigger the provision. The draft sets out a typical one. These may also be backed by a generalised “catch all”, as in the draft, especially in markets where “country risk” is thought to be very high, and future events very hard to predict. The specific list is divided into “political” events, such as war or armed conflict or political interference with the Project, and “natural/other” events, such as storm and tempest, archaeological finds on Site or pandemic. This is partly a matter of convenient organisation of the text, and partly because the agreement will usually provide somewhat differently for some of their respective consequences.

The procedures applicable to a force majeure provision are important to avoid misunderstandings and abuse. They are summarised in the next sub-clause. The affected party must use reasonable endeavours to overcome the event but is relieved from liability for its inability to perform any obligations affected by it (which are deemed “suspended”). Either party is entitled to terminate the agreement for a prolonged event of force majeure (six months or more is suggested).

Clause 15.5 deals with the difficult subject of adjustments and compensation for events of force majeure and Qualifying Change in Law (lumping the two together as a matter of convenience, as the mechanism works in the same way for both). If the Concessionaire has incurred costs or losses, or its “financial equilibrium” (very much a civil law concept) has been adversely affected, as a result, it can require that adjustments are made to the agreement, if possible, to enable it to continue performing its obligations and compensate it for those costs and losses, such that it is left in the same net financial position as before. Many agreements link this mechanism to the assumed internal rate of return (IRR) reflected in a financial model attached to the agreement, as the draft indicates. The extent to which this mechanism applies to “natural/other” events of force majeure, as well as political ones, is usually a matter of negotiation, even though most of the remedies involved do not actually represent a “loss” for the Contracting Authority in any event. For this reason, the word “political” has been included as a qualification, but in square brackets.

The next sub-clause sets out what these adjustments and related steps may consist of – e.g., technical variations to the design or scope of services, extensions of time, an extension of the Term, tariff adjustments, etc. Cash compensation from the Contracting Authority is a last resort, which may be very contentious in negotiating the agreement's terms. The draft envisages that the provision will be applied by agreement between the parties, but with a right to go to the Dispute Resolution Mechanism if they fail to agree.

16. Default and termination

Clause 16 sets out the grounds and procedure for termination of the agreement for “default”. This is defined in largely standard terms, to cover (for example) material unremedied breach of contract, repudiation of the agreement, insolvency events or adverse dissolution or reconstruction of the Contracting Authority, etc. It is sometimes also necessary to include the exercise of certain statutory powers by the latter which may be essentially incompatible with the Concession. This is allowed for in sub-clause 16.2(f), but in square brackets, as it is unusual.

The termination procedure that comes into play following an Event of Default is designed to give maximum scope to rectify the Event and avoid a “hair trigger” termination, which may be in no one's interests. A Remedy Period of 180 days ensues following a Notice of Intent to Terminate, during which the Defaulting Party must make efforts to cure the Default. If those efforts fail, a further notice period of 180 days follows, at the end of which the agreement stands terminated, unless the Lenders have by then successfully exercised their step-in rights. The aim of this further period is to leave scope for those step-in rights and give time to prepare for a full hand-over of the Port to the Contracting Authority. The former are expressed in the usual terms in the draft, with the Lenders having the right to bring in a substitute entity to replace the Concessionaire altogether and novate the agreement and other project contracts to it. For the purposes of the latter, an Appraising Team is appointed by the parties to carry out a condition survey and valuation of the Contracted Assets.

17. Transfer obligations and compensation payments

On termination or expiry of the agreement, the Concessionaire has to transfer to the Contracting Authority all the Contracted Assets, the Site and all rights and documents necessary to continue operating and maintaining the Port. These are listed. (Please also see the comments under Clause 1 above about

the typical civil law classifications of assets. Some of their legal implications are filled out for the avoidance of doubt. Physical assets have to be in good condition (subject to normal wear and tear). Legal rights must be free of any encumbrances. Assets not subject to transfer must be removed within three months.

The next sub-clauses summarise the calculation of any compensation payments on an early termination of the agreement. Note that these provisions tend to take on a “life of their own” in concession agreements, reflecting the preferences of the parties and their advisers, the idiosyncrasies of the project and the dynamics of negotiation. There are often wide differences between one agreement and another. The draft suggests one set of possible approaches, taking account of both “bankability” and fairness between the parties. Many others are possible.

The Clause distinguishes between three different phases of the project and the reasons for termination in providing for compensation. (i) If during the Development Period, the Concessionaire may be entitled to all or a portion of its Development Costs – that is, sums actually spent on developing the Project to date – depending on the exact grounds of termination. Concessionaire receives nothing if its own default has led to the termination. (ii) If termination occurs during the Construction Period, the Concessionaire is fully reimbursed for all sums spent on the Project where “Contracting Authority risk” events are responsible (i.e., Contracting Authority breach of contract, Qualifying Change in Law or political force majeure), plus a premium representing lost profit. Where the Concessionaire is itself at fault, it still receives the sums actually spent on the Project, but without any premium and less any losses the Contracting Authority may suffer from the breach. Similarly, there is no premium where “other” (non-political) force majeure or prolonged force majeure are involved, but at least a proportion of the equity invested and the outstanding debt are covered. (iii) Termination during the Operation Period is handled in a similar way to (ii), but uses the concept of equity market value plus outstanding debt, rather than sums spent on the Project.

These approaches reflect both the expectations of project-finance lenders, who would usually insist on being kept whole (or largely whole; the draft allows for at least a percentage of them) whatever the reason for termination, and the value of the assets transferred to the Contracting Authority on a termination. The Concessionaire is compensated for its lost profits and sums invested where it is not at fault, while the Contracting Authority can deduct its own costs and losses where it is itself blameless. Any insurance proceeds payable on a termination are also factored

in. The calculations are made by the Appraising Team, but could be challenged by either party through the Dispute Resolution Procedure.

18. Transfer procedures on termination

This describes exactly what has to happen on termination or expiry of the agreement, as the Contracted Assets and the Port are handed over to the Contracting Authority. The Clause itemises the assets and rights to be transferred (unless the Concessionaire simply has to remove them. See comments above about limited brownfield concessions). The remaining useful life of the Assets, to the extent it is a “contracted” figure, would need careful thought and negotiation. There may be an additional short “maintenance period” for them following transfer, during which the Concessionaire must return and repair defects. The training of key Contracting Authority staff before hand-over is also dealt with. The Appraising Team has to report on the condition of the Contracted Assets immediately before hand-over.

19-24. Remaining provisions

These should be largely self-explanatory. The agreement is subject to local law but international arbitration at a recognised international venue. Allowance is made for a dispute-resolution panel (essentially, a sophisticated form of expert adjudicator), if the parties wish to include one; its procedures would be set out in an annex. A wide-ranging waiver of sovereign immunity is usually included in concession agreements, to ensure that proceedings under their terms can be brought and enforced.



Model heads of terms for seaport concession PPP agreement

(A) PARTIES

(1) [Public Partner] [Insert details] (“Contracting Authority”)

(2) [Private Partner Project Company (usually special purpose vehicle)] [Insert details] (“Concessionaire”)

(3) [] [Insert details of any additional party (if any) e.g., government guarantor] (“Government”)]

(each a “Party” and together the “Parties”)

(B) RECITALS

WHEREAS:

(1) The Contracting Authority was constituted by the Government of [host country] under the provisions of [Law/Decree []] (the “Ports Law”) and has been vested with the power to develop, manage, manage, operate and control container, trans-shipment and other types of port in [host country].

(2) [The Government of [host country] has enacted a legislative act relating to [Concessions and other forms of] Public-Private Partnership[s] (“PPPs”) in [host country], which came into effect on [] (the “PPP Law”);]

(3) The Contracting Authority has decided to establish, equip and operate a multi-purpose [container terminal] port (the “Project”, as more fully defined below) in the [Region/ Municipality of], in accordance with Decree No. [specify any relevant law], to develop and strengthen the capacity of port-related services in the [specify region] of [host country];

(4) The Contracting Authority organised and held a competitive tender for the award of the right and obligation to implement the Project in [] in accordance with Applicable Law and its Decision no. [] of that year, pursuant to which the [private partner’s entity/consortium (“Sponsor”)] was selected as the winning bidder, based on its proposal to implement the Project on a [Concession/BOT][SPECIFY] basis in accordance with applicable [international] standards;

(5) The Contracting Authority has now agreed, in accordance with the [specify any relevant Memorandum of Understanding/Heads of Terms] and pursuant to the Ports Law [and specify any other relevant laws], the laws of [host country] and Decision No. [] of [] [SPECIFY FORMAL ADMIN. DECISION], to grant a concession to the Concessionaire for the development, financing, design, construction,

operation, maintenance and commercial exploitation of the Port and the Contracted Assets (the “Concession”), for the Term (as defined below), and their subsequent transfer to the Contracting Authority at the end of the Term, on the terms and conditions set out in this Agreement;

(6) The Parties have agreed to render all necessary cooperation and assistance and take appropriate action for giving effect to the terms of this Concession Agreement and all other agreements referred to herein in accordance with (and subject to) their terms, both during the remainder of the Development Period and the rest of the Term.

(7) [INSERT ANY OTHER RELEVANT RECITALS]

NOW THEREFORE, in consideration of the premises and the mutual covenants herein contained, the Parties hereto hereby agree as follows:

(C) TERMS AND CONDITIONS

1. Definitions and interpretation

1.1 Definitions. Definitions of all key terms, including:¹

- Agreement – this agreement (including the Detailed Project Report or DPR and other Annexures) as amended from time to time
- Ancillary Facilities – structures, buildings, commercial developments, etc., ancillary to the Project and outside the Contracted Assets
- Applicable Law – all binding laws of [host country]
- Change in Law (CIL) – as defined in Clause []
- Concession – as defined in Clause 3
- Contract Documents – the various documents comprised in the Agreement or deemed to form part of it
- Contracted Assets – identified assets intrinsic to the Project which are subject to the design, construction, maintenance, operation and transfer obligations in the Agreement
- Construction Period – the period between Financial Close and the Operational Period
- Design and Construction Commencement Date – as defined in Clause 4.2
- Detailed Project Report (DPR) – the critical “control document” for the Project, containing technical specifications and key applicable standards
- Development Period – the period from signature up to Financial Close
- [Development Costs – the costs [reasonably and] actually incurred by the Concessionaire/Sponsor in developing the Project before the date of Financial Close]
- Effective Date – as defined in Clause 2
- Financial Close – the date on which all Financing Documents have been signed and funds thereunder have become available, all conditions precedent having been satisfied
- Financing Documents – all documents relating to the debt financing of the Project, including security documents and any Direct Agreement
- Financing Obligations – all amounts required to repay any principal and interest outstanding and due under the Financing Documents, plus associated costs and expenses
- Force Majeure – as defined in Clause 15
- Good Industry Practice – that degree of skill, care, diligence, prudence and foresight reasonably to be expected of an experienced international developer/operator performing similar responsibilities to the Concessionaire’s to the specified standards
- [Lease – any separate formal lease of the Site entered into by the Parties]
- Lenders – the lenders under the Financing Documents
- Long Stop Date – as defined in Clause 4.3
- Operating Procedure – as defined in Clause 12.5
- Operational Period – the period between the start of operations and the expiry or termination of the Agreement
- Operational Port Declaration – as defined in Clause 10.8
- [Phase – define if the Project has different identified phases, some of which may be contingent]
- Port – the [type e.g., container terminal] port the subject matter of the Agreement
- Project – the development, financing, design, construction, completion, operation and maintenance

¹ NB Not a complete list and contains only summary, indicative definitions of main terms. The final list of definitions is likely to be at least three or four times as long. We also have not included here all the defined terms used in the HoT, where these are only used in isolated provisions.

of the Contracted Assets and the provision of Services to users of the Port

- Relevant Authority – any government or quasi-governmental body with jurisdiction over any aspect of the Project
- Services – the services to be provided by the Concessionaire to users of the Port, including those listed in the DPR
- Shareholder – any shareholder or owner of the Concessionaire
- Site – the site of the Port and the Project, as identified in Annexure [], being the land plot with cadastral number []
- Term – as defined in Clause 2
- Transport Infrastructure and Utility Linkages – all transport linkages and utility supplies necessary for the Project (e.g., road, rail, power, water, heating/cooling)
- Vacant Possession – full right to enter, occupy and use property free of any claims by third parties

1.2 Interpretation. Standard interpretation clause, including document prioritisation clause. Consents and approvals not to be unreasonably withheld or delayed unless specifically provided otherwise.

2. Term and effectiveness

2.1 Except as otherwise provided herein, this Agreement shall take effect on signature (“Effective Date”) and remain in force until the date falling [20] years from the date of [Commencement of Operations] (the “Term”), unless earlier terminated in accordance with its terms.

2.2 The Term may be extended from time to time as provided herein, but subject always to Applicable Law.

3. Grant of concession

3.1 The Contracting Authority hereby grants to the Concessionaire full right and authority during the Term of this Agreement to develop, finance, design, construct, lease, operate, maintain and commercially exploit the Contracted Assets and the Port, to do or procure all things necessary in connection therewith, including [ELABORATE AS APPROPRIATE ON MAIN RIGHTS AND OBLIGATIONS COMPRISED IN “CONCESSION”] (the “Concession”).

3.2 At the end of the Term, the Concessionaire shall be obliged to transfer the Contracted Assets and the

operating Port comprising them to the Contracting Authority, in a fit state for their use, operation, management and continued performance for a further notional period of [5/10] years from the date of completion of the transfer process, as more fully provided in Clause [16].

3.3 The rights granted to the Concessionaire hereunder in relation to the Port and the Project are and shall remain exclusive to it during the Term. The Contracting Authority shall not grant any such rights to any other person at the Site, allow any other person to attempt to develop and implement the Project at the Site or grant or negotiate any concession or similar contract with any other person for such purpose during such time.

3.4 The Concessionaire accepts the Concession granted to it by the Contracting Authority under sub-clause 3.2. above and agrees to exercise its rights and perform its obligations in relation thereto in accordance with (and subject to) the terms and conditions of this Agreement.

4. Conditions precedent

4.1 Conditions. Except for the provisions of Clauses [] and the related Annexures, if any, each of which shall take effect on the Effective Date (signature), all other rights and obligations of the Parties under this Agreement shall only come into full force and effect upon satisfaction (or waiver) of the following conditions (“Conditions Precedent” or CPs):

[SPECIFY e.g.:

- [Sufficient additional development capital raised to enable Development Period obligations to be successfully completed;]
- Any formal authorisations or steps taken (for example, ratification) which are necessary under Applicable Law to make the Agreement binding and enforceable;
- [The Concessionaire will have appointed a world-class port operations company, reasonably acceptable to the Contracting Authority, to act as port operator [and Shareholder];]
- All necessary due diligence on the Project and the Site carried out to the Concessionaire’s satisfaction;
- [For a brownfield project – transfer of assets and personnel comprised in the Concession to the Concessionaire, drawing up of full inventory, waiver of rights by original operator, etc.]
- Any remaining technical and commercial studies

and documentation necessary to implement the Project finalised and agreed by the Parties [including a full Feasibility Study;]

- [Base Case Financial Model prepared by the Concessionaire;]
- [All [remaining] Annexures, including the DPR, finalised, agreed and attached to the Agreement;]
- All the main Project Contracts necessary to proceed with design and construction, as listed in Annexure [], signed and effective;
- [The Lease signed and effective;]
- The whole of the Site acquired by the Contracting Authority and made available to the Concessionaire, with Vacant Possession[, in accordance with the Lease];
- The Site cleared by the [Contracting Authority] of any identified obstacles to construction and in a fit state to enable Concessionaire to proceed with design and construction without delay;
- [Full management and operational control over all assets, equipment, infrastructure and staff comprising the Existing Port [as defined] has been handed over to the Concessionaire, as provided in the DPR][NB brownfield projects only]
- All Transport Infrastructure and Utility Linkages necessary for the Project [or to proceed with design and construction] obtained and in place;
- All permits, licences and consents necessary under Applicable Law to proceed with development, design and construction [(for instance, formal port declaration/consent to construct/ Services authorisation)] in place;
- [Any specific legal acts necessary to implement the Project in place and effective. Formal confirmation received that no others are necessary];
- Legal opinions issued on behalf of each of the Parties confirming capacity, due execution of Agreement and obligations valid, binding and enforceable;
- [OTHER AS APPROPRIATE]
- [the payment of an up-front concession fee/ provision of performance bond];
- Formal notice given on behalf of the Lenders that Financial Close achieved.

4.2 Satisfaction of CPs. The Contracting Authority and the Concessionaire shall each [endeavour/ use reasonable endeavours to satisfy the CPs (within the

scope of their respective powers and responsibilities) as soon as practicable after the Effective Date and in any event no later than the date referred to in Clause 4.3 below. Each shall use reasonable endeavours to complete the specific steps respectively assigned to them in Annex [] by the dates referred to therein. The “Design and Construction Commencement Date” shall mean the date on which all CPs have been satisfied or waived by the Parties.

4.3 Long Stop Date. [It is the intention of the Parties that] the Design and Construction Commencement Date shall be achieved no later than [6/12/18] months from the Effective Date, or such later date as may be agreed by them or determined pursuant to the Agreement (the “Long Stop Date”). If the Design and Construction Commencement Date is not achieved by such date, either Party shall be entitled to terminate the Agreement on written notice to the other. [In that event, the Concessionaire shall be entitled to recover such portion of its reasonable and audited Development Costs as may be provided under [Clause/ Annex []], provided that such termination has not arisen as a result of the Concessionaire’s breach of contract].

4.4 [Audit, etc. Procedure for audit and payment of Development Costs and delivery of copies of all documents, designs, studies, etc., to Contracting Authority against payment].

5. Covenants – general and preliminary

5.1 Contracting Authority. The Contracting Authority shall:

- (a) take all steps within its power to apply for and obtain all necessary formal approvals of the Port as a port under Applicable Law and issue/publish any associated declarations/ notifications;
- (b) acquire or procure the acquisition of the whole of the Site (and any necessary Reclaimed Land) as identified/ delineated in Annex [], with full and unencumbered title, as soon as practicable after the Effective Date, and transfer or procure the transfer of leasehold interest and Vacant Possession of the same to the Concessionaire for the purposes of the Project in accordance with this Agreement [and the Lease]. [When transferred [and leased] to the Concessionaire, the Site shall be free and clear of any obstacles to construction and in a fit state to enable the Concessionaire to proceed with design and construction without delay];
- (c) [enter into the Lease with the Concessionaire as soon as practicable after the Effective Date;]

(d) [acquire or procure the acquisition of any additional land needed for any subsequent Phases of the Project at the times and in the manner set out in the DPR, and transfer [leasehold interest] and Vacant Possession of the same to the Concessionaire as required thereby;

(e) not grant or create any security interests of any kind in the assets comprised in the Site, the Port or the Project in favour of any person other than the Concessionaire at any time;

(f) [carry out a full dredging of the sailing channel into the Port as more fully particularised in the DPR];

(g) undertakes and confirms (without prejudice to the termination provisions) that none of the Contracted Assets, the Port, the Site or any part of them shall be nationalised, expropriated, seized, taken over or the equivalent by or on behalf of the Government of [host country] or the Concessionaire's rights and powers hereunder cancelled or abrogated before the end of the Term other than in full accordance with Applicable Law and the express provisions hereof and without full compensation being paid to the Concessionaire for all resulting loss and damage;

(h) provide reasonable support and assistance at all times to the Concessionaire in connection with the implementation of the Project, including by way of providing available information, interfacing with Relevant Authorities, helping to obtain permits and consents or the enactment of any new legislation or regulations needed for the Project, [identifying appropriate local staff and employees,] helping to resolve specific issues and difficulties, etc.

(i) not interfere with, obstruct, or hinder the rights granted to the Concessionaire hereunder to design, develop, finance, construct, operate, maintain and commercially exploit the Contracted Assets and the Port, save only as otherwise specifically provided herein (including under sub-clause (j) below) and in accordance with Applicable Law;

(j) [modify or vary the Services at any time, on reasonable written notice to the Concessionaire, as the Contracting Authority reasonably considers necessary in accordance with its powers under duties under Applicable Law to protect the continuity of their provision and the public interest, provided that any additional costs, expenses or losses of the Concessionaire resulting therefrom are fully and effectually reimbursed or indemnified. The Concessionaire may treat any such modification or variation as an event of political force majeure].

5.2 Concessionaire. The Concessionaire shall:

(a) be responsible for carrying out and/or procuring

the design, development, financing, construction, operation, maintenance and commercial exploitation of the Contracted Assets comprised within [Phase 1 of] the Project, the provision of all Services to users of the Port, the [setting and] levying of all tariffs and Commercial Charges, the development and use of any Ancillary Facilities at the Port and the Site, and all other matters comprised within the Concession, in accordance with the terms and requirements of this Agreement, Applicable Law [and the EBRD/ IFC Performance Requirements/ Standards and EHS Guidelines];

(b) [in respect of any subsequent Phases of development of the Port described in the DPR or otherwise agreed with the Contracting Authority, shall carry out and/or procure and implement the same in accordance with the DPR or such agreement.][MORE SPECIFIC AS NEC.]

6. Statutory obligations and entitlements of the parties

6.1 Applicable Law and Good Industry Practice. The Parties shall perform their obligations, exercise their rights and discharge their responsibilities under the Agreement in accordance with Applicable Law and (in the case of the Concessionaire) Good Industry Practice.

6.2 Project Compliance with Applicable Law. The Contracted Assets and the Port as designed, constructed, managed and operated by the Concessionaire shall comply fully with Applicable Law.

6.3 General. Concessionaire in particular to comply with and give effect to Applicable Law at the Site in relation to the environment, health and safety, terms of employment, conditions of work, wages and salaries, non-discrimination, etc. [OTHER AS APPROPRIATE.]

6.4 [Tax Exemptions. The Project and the Services shall benefit from the tax and duty exemptions and concessions specified in the DPR [OR SPECIFY].]

6.5 [Duty-Free Zone. INCLUDE ANY RELEVANT PROVISIONS RELATING TO A DUTY-FREE ZONE AT OR CONNECTED TO THE PORT].

6.6 Government Powers not Restricted. For avoidance of doubt, Government's statutory powers not restricted or qualified by the Agreement, but without prejudice to any rights or remedies of the Concessionaire hereunder.

6.7 Finance and Security. Concessionaire shall have full control over sourcing, terms and negotiation of all

financing and security arrangements and documents required for the Project, and shall be entitled to create such security interests over all its rights and assets as may be permitted under Applicable Law and necessary for this purpose. [Contracting Authority entitled to review and comment on financing and security documents.]

7. Regulatory framework

[Insert any specific provisions needed in relation to host country's port regulatory regime and any anticipated changes to it.]

8. Development period

8.1 Technical Records and Studies. Contracting Authority to make available to Concessionaire all records, documents, studies and data relating to the Port, the Project and the Site as soon as possible after Effective Date, subject to any reasonable confidentiality restrictions.

8.2 Clearances (Licences and Permits). Contracting Authority to use [best/reasonable] efforts throughout the Term to assist Concessionaire to obtain any clearances required for the purposes of the Project or Concessionaire's rights and obligations. [In particular, Contracting Authority shall obtain those specific clearances on behalf of the Project/ Concessionaire listed in Annex [].]

8.3 Design Engineer and EPC Contractor. Detailed Engineering Drawings.

(a) Concessionaire fully responsible for production of all detailed designs and specifications for the Project, which shall be in accordance with the requirements of the DPR and the Contract Documents.

(b) Concessionaire shall appoint the [Design Engineer and] Engineering, Procurement and Construction (EPC) Contractor on or before Design and Construction Commencement Date, [each] of international standing and repute and appropriate qualifications and experience. Names and credentials to be provided to Contracting Authority at the time of their appointment.

(c) Copies of such of detailed design and engineering documents identified for this purpose in the DPR to be submitted to Contracting Authority for its [information and review] within a reasonable time after preparation. Concessionaire to respond promptly in writing to any reasonable questions or concerns about them raised by the Contracting Authority. Copies of all final designs for the Contracted Assets to be provided to the Contracting Authority.

8.4 Land.

(a) Ownership of all land comprised within the Site (including Reclaimed Land) [and leased] [to the Concessionaire under the Lease] shall remain with the Contracting Authority.

(b) All such land (and its use and occupation) shall revert to the Contracting Authority on termination of the Agreement and the Lease.

(c) Concessionaire shall not dispose of its legal interest in such land to any third party (but without prejudice to its right to sublease, subcontract and grant security interests).

(d) [The term of the Lease shall run concurrently with this Agreement and terminate at the same time. The Lease shall not be terminated otherwise.]

(e) Contracting Authority to provide Concessionaire with any easements (or equivalent rights) relating to the Site and necessary for the purposes of the Project, including any identified in the DPR.

(f) Title to any Reclaimed Land acquired for the Project shall vest in the Contracting Authority. Such land shall be deemed to form part of the Site and shall revert to the Contracting Authority with the Site on termination. [(The Lease shall be amended as necessary to allow for its inclusion)]. Acknowledged that Reclaimed Land shall form an integral part of the associated asset infrastructure for the Contracted Assets.

(g) Concessionaire may sublease or sublicense any part of the Site for the purposes of the Project and the exercise of its rights and performance of its obligations. [Concessionaire shall notify Contracting Authority in advance of the identity, experience and capabilities of any material [DEFINE] sublessee or sublicensee, to which it may raise reasonable objections based on a reasonable belief that it may not be able to discharge its responsibilities or be harmful to national security].

(h) [Contracting Authority to acquire or procure the acquisition of any additional areas of land outside the Site boundaries (if any) needed for the expansion of the Port in subsequent Phases in accordance with the DPR and identified therein. Such areas to form part of the Site on acquisition. [Lease to be amended accordingly]].

(i) [Any lease rentals for the Site to be set out in the Lease and subject to periodic revisions pursuant to its terms.]

8.5 Progress Monitoring and Status Reports.

Contracting Authority and Concessionaire shall provide each other with regular status reports relating to the

performance of their respective obligations during the Development Period at the times and in the manner required by Annex [].

8.6 Provision of Transport Infrastructure and Utility Linkages. Contracting Authority responsible for providing or arranging the provision of all Transport Infrastructure and Utility Linkages needed for the Project. If a material delay in providing any such Linkages delays the progress or completion of the construction works or the Commencement of Operations, Concessionaire shall be entitled to an extension of the Scheduled Construction Period on a day-by-day basis until they have been provided in full.

9. Corporate structure

9.1 Incorporation. Acknowledged that Concessionaire is a [limited liability company] incorporated in [host country]. Confirmed that Concessionaire's corporate documents are in accordance with the requirements of this Clause and have been submitted to Contracting Authority, together with information in reasonable detail about Concessionaire's corporate structure and shareholdings. Concessionaire shall inform Contracting Authority of any material change to its corporate structure, shareholdings, ownership interests or corporate documents, but any such changes shall only require Contracting Authority's approval where this Agreement specifically so provides.

9.2 Requirements. Concessionaire may not engage in any business activities outside the scope of the Project without Contracting Authority's consent. Concessionaire shall prepare and maintain all records, documents and accounts required under the laws of its place of incorporation. [Concessionaire may incorporate one or more subsidiary or affiliated companies in [host country] to assist it to perform its obligations and exercise of its rights hereunder as effectively as possible].

9.3 Composition of/Changes to Shareholdings. Acknowledgement of shareholdings in Concessionaire as at Effective Date. [SPECIFY ANY RESTRICTIONS ON FUTURE CHANGES TO SHAREHOLDINGS, e.g.] Concessionaire undertakes that no acquisition of its shares will be made by any person which, in Contracting Authority's reasonable opinion, would be contrary to applicable law or the national interest or otherwise materially detrimental to the implementation, operation or reputation of the Project.

9.4 [No disposal of critical interest without consent. Concessionaire not to agree to any disposal of its Shareholding by [][IDENTIFY ANY CRITICAL

SHAREHOLDERS] for a period of [] years after the Effective Date without the consent of Contracting Authority.]

10. Design and construction

10.1 Length of Design and Construction Period. The period for completion of construction of the whole of the Contracted Assets ("Scheduled Construction Period") for Phase 1 shall be [36] months, starting on the Design and Construction Commencement Date, as the same may be extended in accordance with the terms hereof. [For any subsequent Phases of the Project, the Scheduled Construction Period shall be as specified in the DPR or otherwise agreed by the Parties].

10.2 Obligations to Design and Construct.

(a) Concessionaire shall carry out (or cause to be carried out) all works of design, construction, building, supply and equipping of the Contracted Assets in the time and manner required by this Agreement. All such work shall be in accordance with the DPR, the Contract Documents, the standards laid down therein and the final designs and drawings.

(b) Concessionaire to provide Contracting Authority, for its information, within [15] days after Design and Construction Commencement Date, a programme of the timetabling of the design and construction works, showing how completion will be achieved within the Scheduled Construction Period.

(c) Concessionaire confirms that it is familiar with the Contract Documents and understands all their requirements. Deemed to have investigated the nature of the work, verified all measurements and quantities, and carried out all necessary tests and examinations. Subject to variations for material difficulties not reasonably foreseeable at Effective Date, including in particular the risk of contamination or discovery of items of historical/ archaeological importance or interest on Site.

(d) In the event Concessionaire is or is likely to be delayed in performance of its design and construction obligations by a Change in Law or force majeure event, it shall be entitled to a reasonable extension of the Scheduled Construction Period (and any other relevant deadlines) in accordance with Clause [] (but without prejudice to any other rights or remedies).

(e) [If the Concessionaire fails to complete the construction works by the end of the Scheduled Construction Period, as extended from time to time under paragraph (d) above, it shall pay liquidated

damages of [...] per day of delay up to a maximum amount of [], at which point this Agreement may be terminated by the Contracting Authority for a Concessionaire's Event of Default].

10.3 Construction Monitoring and Inspection.

(a) Contracting Authority entitled to carry out such monitoring, inspection, testing and measuring of the construction activities on Site as may be reasonable in all circumstances to satisfy itself that they are all in conformity with the DPR and the Agreement's requirements. [INSERT ANY LIMITS – e.g., one per calendar quarter.]

(b) Concessionaire to provide regular status reports on design and construction as required by Annex [] and such data, documents and reports in its possession as may be reasonably requested from time to time.

(c) Concessionaire to provide unhindered access and reasonable cooperation to Contracting Authority for monitoring and inspections, which shall be carried out at reasonable times and on reasonable notice so as not to delay or disrupt progress.

(d) [Contracting Authority may set up and maintain a site office for monitoring purposes. Concessionaire bears reasonable running costs.]

10.4 Transport Infrastructure and Utility Linkages.

Contracting Authority to ensure that all transport and similar infrastructure linkages to the Site and all utilities (incl. water, power, gas, waste [OTHER]), necessary for the Project or identified in the DPR are provided and made available for the benefit of the Concessionaire as soon as practicable after the Effective Date, and thereafter properly and efficiently maintained throughout the Term. Concessionaire to be kept informed about progress of their supply and installation and to provide Contracting Authority with reasonable assistance as required.

10.5 Subcontracts

(a) Concessionaire may subcontract any of its design, construction, operation and maintenance responsibilities to third parties with suitable experience, skills and resources. Contract terms must be consistent with this Agreement. Concessionaire to keep Contracting Authority regularly and properly informed about subcontracting activities and notify it in advance of the identity and credentials of any material subcontract. [DEFINE MATERIALITY – for example, annual expenditure of at least US\$ 500,000]. [Contracting Authority can raise reasonable objections to any material subcontractor which it reasonably believes [will not be able to perform or] would be harmful to national interest.]

(b) No subcontracting shall relieve Concessionaire of

any of its obligations hereunder. Concessionaire to ensure that all subcontractors perform to the requisite standards and shall be fully liable for any failures or breaches of contract on their part. Copies of material subcontracts to be provided to Contracting Authority.

10.6 Design and Construction – General.

(a) Concessionaire to perform all its design, construction, operation and maintenance responsibilities in accordance with Good Industry Practice and to the standards specified in the DPR. It shall have full control over all aspects of the organisation, management, planning, ordering and logistics of the design and construction works, but subject to the following requirements;

[SPECIFY e.g.

- Records and documents to be maintained/ made available to Contracting Authority
- Make use of local products and equipment where reasonably practicable
- Make use of local labour/ manpower where reasonably practicable
- Responsible for all working methods, etc.
- Appoint and maintain at Site a suitable qualified representative and staff to interface with Contracting Authority
- Responsible for any necessary housing of staff and workers at Site
- Ensure that staff and employees on Site are subject to regulations and restrictions under local law. Comply with employment laws under applicable law
- Maintain order and security at the Site
- Carry out all necessary testing and sampling, etc.
- Responsible for health and safety, take reasonable care to avoid death or injury, etc.
- Responsible for prompt reporting/ notification of any findings of antiquities or objects of significant historical, cultural or archaeological value on Site. Entitled to suspend progress of construction works if necessary while finds protected and removed, and to treat discovery as event of force majeure.

10.7 Detailed Project Report (DPR). All design and construction of the Contracted Assets to be in accordance with the DPR. Prior written approval of Contracting Authority needed for any material variation of the DPR, which shall not be unreasonably withheld if [proposed change would not materially prejudice the overall functioning, capacity, operation

or standards of the Port, or] is otherwise reasonably justified for performance of Concessionaire's obligations or necessitated by Change in Law. Scheduled Construction Period to be adjusted as necessary as a result. Contracting Authority to respond promptly and in any event within [one month] to any proposed variation. Changes can also be made by simple agreement between the Parties.

10.8 Operational Port Declaration. Concessionaire may notify Contracting Authority during Construction Period of substantial completion of the whole or such part of the Contracted Assets as makes possible their use as a functioning port, and are accordingly ready for formal declaration as a public port (the "Operational Port Declaration"). Contracting Authority entitled to verify this by inspections, attending final tests and receiving copies of relevant certificates and other documents under EPC Contract, etc. Contracting Authority agrees to rely on certificates, test results, etc., unless subject to manifest error. At the earliest practicable date after such verification, Contracting Authority shall issue (or procure issue) of Operational Port Declaration, and take all necessary steps to give legal effect to it (including publication). Concessionaire entitled to start operating and using the relevant facilities as a port as from such issue.

10.9 Date of Commencement of Operations. This shall mean the date on which the Operational Port Declaration becomes effective (and any remaining Conditions Precedent have been satisfied or waived). If issue or effectiveness of Declaration is delayed without fault on Concessionaire's part, Concessionaire entitled to a day-for-day extension to the Scheduled Construction Period. Contracting Authority shall use reasonable endeavours to expedite its coming into effect.

10.10 Completion of Whole of Construction. Contracting Authority shall carry out inspection of all Contracted Assets promptly following notice from Concessionaire that their construction has been substantially completed. If reasonably satisfied as to substantial completion in accordance with the Agreement, it shall issue a Certificate of Completion of Construction.

11. Ownership of contracted assets

11.1 [Ownership of Assets. Acknowledged that legal title, right and interest in and to the Contracted Assets during the Term vested in [Concessionaire] to extent permitted by applicable law, until transferred to Contracting Authority. Concessionaire entitled to maintain, repair, replace and improve any of them at discretion, provided they remain at all times in conformity with the DPR, the detailed design and this Agreement.]

11.2 Security. Concessionaire entitled to grant security interests in accordance with Applicable Law in all its rights and interests in this Agreement, the Lease, the Project Contracts, the Contracted Assets, the Port and the Project for the purposes of financing the implementation of the same, including by way of [mortgage/charge/assignment/[OTHER], etc].

12. Operations

From the Date of Commencement of Operations, the following provisions shall be applicable:

12.1 General. Concessionaire entitled and obliged to manage, operate, maintain and commercially exploit the Contracted Assets and the Port and provide the Services throughout the Operational Period, regularly and without unreasonable interruption, in full accordance with the requirements of this Agreement, Good Industry Practice and the standards specified herein, at its own cost and expense (save as otherwise provided), and to collect and retain the revenues and profits therefrom (other than the Sovereign Tariffs).

12.2 Autonomy. Concessionaire entitled to plan, organise, manage (etc.) all its activities, the operational regime and the management of its business as it judges best at its discretion to exercise its rights and meet its obligations, including (for the avoidance of doubt and subject to Applicable Law)) the following specific activities:

- (a) hire and fire staff;
- (b) enter into commercial contracts, subcontracts, subleases, etc.
- (c) issue all rules and regulations for organisation of work/ working practices on Site;
- (d) open and maintain bank accounts in local and foreign currency both inside and outside [host country];
- (e) borrow from local and international banks;
- (f) use, apply, retain, distribute, etc., any capital invested in the Project;
- (g) retain or distribute net profits from the Project and transfer the same within or outside [host country];
- (h) make use of foreign labour where local labour impractical or insufficiently qualified;
- (i) [specific staff retention/ entry and exit rights?];
- (j) enjoy full benefit or rights under this agreement or Applicable Law to use and develop the Site and any related real estate for purposes of or connected

with the Project, including developing any Ancillary Facilities;

(k) receive, retain, use and apply all revenues resulting from the commercial exploitation of the Contracted Assets and Project (other than Sovereign Tariffs);

(l) [enjoy any privileges or exemptions available under applicable investment promotion laws, for example, tax or duty exemptions];

(m) [rights of foreign workers to transfer salaries or wages abroad, etc.];

(n) [OTHER AS APPROPRIATE.]

12.3 Pilotage, Guidance, etc. Concessionaire to ensure that any pilots it engages at the Port are properly licensed by Relevant Authorities. Concessionaire to take reasonable steps to familiarise pilots with local waters of Port and any applicable official guidelines. All guidance and towing activities to comply with Good Industry Practice.

12.4 Operations and Services. Concessionaire shall, in accordance with this Agreement and Good Industry Practice:

(a) efficiently and regularly operate, maintain, manage and make available the Contracted Assets;

(b) provide all resources necessary for the operation and maintenance of the Contracted Assets and the Port;

(c) provide the Services to the users of the Port to the standards specified in the Contract Documents, without any unreasonable interruption, [failure of which the liquidated damages provided for in the same Contract Documents may be applied by the Contracting Authority];

(d) provide access to the Port to users and shipping lines on a non-discriminatory basis (as defined under Applicable Law).

12.5 Operating Procedure. Concessionaire responsible for preparing, notifying and (as required) publishing the written statement of detailed procedures for the operation of the Port and provision of the Services (“Operating Procedure”) in accordance with Applicable Law and the DPR. To incorporate any reasonable suggestions or comments of Contracting Authority, which shall provide reasonable assistance with its preparation. Contracting Authority to be supplied with an up-to-date copy at all times.

12.6 Commercial Contracts. Concessionaire and its subcontractors entitled to enter into (long-term) commercial contracts with third-party users of the Port and its facilities, governing terms of access and use (incl. any permissible priority or exclusivity). Any

such contracts must not be inconsistent with this Agreement and terminate on its termination or expiry.

12.7 Priority Services. Acknowledged that the Government or other relevant Authority may, pursuant to Applicable Law, direct the Concessionaire to provide Priority Services at the Port (i.e., port-related services or facilities which can be mandated to deal with events of national importance, national emergency, environmental catastrophe, etc.). Concessionaire to comply with any such lawful directions to extent practicable and commensurate with available resources. Contracting Authority to indemnify Concessionaire against all resulting costs and losses (including lost profits) and assist it to obtain any available statutory compensation. Concessionaire only liable for Concession Fee payments at such time to extent available revenues permit it to pay them on substantially the same commercial basis as normal. Priority Services deemed to be a force majeure event.

12.8 Subcontracting. Concessionaire may engage subcontractors for provision of the Services. Must ensure they comply with terms hereof and fully liable for performance of their acts, omissions or faults. Contracting Authority has no liability for any sums owed to them on or following expiry of Agreement.

12.9 Leases and Licences. Concessionaire may lease or licence the use of the Contracted Assets or the Site to third parties, keeping the Contracting Authority properly and regularly informed. Leases and licences not to be inconsistent with this Agreement and terminate on its termination or expiry.

12.10 Personnel. Concessionaire and its subcontractors/sublessees, etc., entitled to hire and employ such personnel on such terms as they deem appropriate, provided they do so in accordance with Applicable Law. [Concessionaire shall award at least [] per cent of its employment positions during Operational Period to nationals of [host country] provided they have the necessary skills and experience to perform their respective responsibilities]. Concessionaire to train local employees using up-to-date methods and practices consistent with Good Industry Practice, with a view to ensuring they are properly qualified to manage and operate Port on transfer.

12.11 Security. Concessionaire responsible for physical security of Project and staff within boundaries of the Site and the provision of properly trained and resourced security personnel as reasonably necessary to guard against potential threats and as required by Applicable Law/ Good Industry Practice. Contracting Authority responsible for such security outside Site boundaries. [REFINE AS NEC.] Responsibilities to apply for duration of Agreement from handover of Site.

12.12 Maintenance Standards. Concessionaire to maintain, repair and replace the Contracted Assets as necessary in accordance with Good Industry Practice and any specific schedule/ plan in the DPR.

12.13 Interaction of the Parties.

(a) Each Party to appoint a formal Representative to act on its behalf in relation to the Project, receive communications, notices, etc. Contracting Authority shall also constitute a Committee including its Representative and appropriate technical/ commercial experts to monitor and report on progress of operations at the Port, address specific issues, etc. Concessionaire entitled to rely on its conclusions and decisions as being those of CA.

(b) Concessionaire to submit to the Contracting Authority the following as from Date of Commencement of Operations:

a. annual reports covering operation and maintenance of Port and all relevant material technical/ commercial/ financial/ training matters; [REFINE AS NEC.]

b. traffic/ throughput reports;

c. updates to the list of material third-party contractors.

(c) Concessionaire to provide such further information throughout Term as Contracting Authority may reasonably request to verify that the former is in compliance with terms of the Agreement. Also to provide unhindered access and necessary cooperation for purposes of monitoring and inspecting Project and Port operations, at reasonable times on reasonable notice. [Contracting Authority entitled to on-site office at Concessionaire's cost.]

(d) Contracting Authority shall throughout Operating Period:

a. provide Concessionaire with all reasonable assistance in relation to any procedures or applications required under Applicable Law or by any relevant Authority;

b. [be responsible for berth depths support in accordance with passport depths, and for timely performance of the operational dredging of the operational waters of the berths, water accesses to them, etc., all as specified in the DPR.]

12.14 Contracting Authority Step-In Rights.

(a) Contracting Authority or Government ("Step-In Entity") entitled to take over operation of the Port (in

whole or part) for purposes of ensuring its continuity and the effective provision of the Services where necessary (and required by statute) for it to do so to:

a. prevent, mitigate or eliminate an emergency [DEFINE] where the Concessionaire, in breach of contract, is unable to do so itself; or

b. on reasonable and proper grounds of national security.

(b) Step-in rights exercised by giving Concessionaire as much notice as practicable. If in accordance with this Clause, Concessionaire to allow Step-In Entity to take over operation of Port (in whole or part) for such period of time as necessary to deal with emergency or matter of national security. Concessionaire to provide reasonable assistance. During such time, Step-In Entity fully responsible for managing, operating and maintaining facilities taken over, for collecting all revenues therefrom and for all costs and liabilities of Concessionaire relating thereto (other than resulting from any breach of contract). [Revenues held on trust (or equivalent²)/for the account of Concessionaire.]

(c) Operation and control of Port to be returned to Concessionaire in full as soon as possible after ground to step in have ceased to apply, and in any event within [six] months. If not at fault, Concessionaire entitled (unless already fully compensated) (a) to extension of Term equivalent to duration of exercise of step-in rights, which are deemed to constitute political force majeure event; and (b) to terminate Agreement for prolonged political force majeure where operation and control not returned to it within [six] months.

13. Commercial matters

13.1 Traffic Reports. Concessionaire to submit annual traffic and cargo throughput reports to Contracting Authority, showing any variances against projections.

13.2 Tariffs. Concessionaire entitled to [set,] revise, levy and collect all tariffs and fees for its services, in accordance with Applicable Law and Annex [] of this Agreement. To include both permitted tariffs for port usage and other commercial charges. [Allow for "Sovereign Tariffs" collected on behalf of Government?] Can structure them [at its discretion] subject to any applicable regulations.

13.3 Public Notification. Tariffs to be non-discriminatory in accordance with Applicable Law; although Concessionaire may customise packages of services and charges for individual users. Comprehensive tariff schedules setting out rates and

² A "trust" is a common law concept. The civil law equivalent is a simple notion of "on behalf of" or "for the account of" someone else.

timing shall be published and notified to port users by Concessionaire. Concessionaire can arrange for tariffs and charges to be collected by third-party agency.

13.4 Concession Fee and Non-Discrimination. Any Concession Fee (if any) payable in respect of operation of the Port (including any relevant exemptions) to be determined and paid in accordance with detailed provisions set out in the DPR (for example, flat rate/throughout-based/ profit-share). Contracting Authority warrants and undertakes that it shall not levy charges, royalties or fees (including Concession Fees) at any other comparable ports in [host country] on terms materially more favourable than those that apply at the Port, and that all Sovereign Tariffs are charged on a consistent and non-discriminatory basis.

13.5 [Guarantee/ Revenue Support. ALLOW AS APPROPRIATE FOR ANY SPECIFIC GOVERNMENT REVENUE SUPPORT OR WIDER GUARANTEE.]

13.6 Additional Contracted Assets. Concessionaire may from time to time ask the Contracting Authority to approve additional assets to be constructed or installed at Port as Contracted Assets, including as part of implementation of further Phases, provided their value exceeds the threshold amount specified in the DPR. The procedures and criteria in Clause 10 shall apply to such requests. Approval deemed to be given if no response from Contracting Authority within [60] days. Relevant designs and studies for such assets also subject to approval on the same basis, and shall become part of the DPR.

13.7 Expansion. Concessionaire entitled to develop and expand the Port and the Contracted Assets during the Term, either by implementing subsequent Phases or as seems reasonably constructive and appropriate to Concessionaire for the purposes of the Project, provided the Project [and host country] economics, cargo and traffic throughout, the state of the relevant financial markets [and host country political situation] are deemed [by Concessionaire] to justify it. Formal variations to DPR to be made as necessary. Subject to the approval of Contracting Authority.

13.8 [Competition. Contracting Authority undertakes that neither it nor the Government shall develop or permit to be developed any materially competing ports or similar facilities in [host country] [within a distance of []km from Port/ between specified longitudinal/ latitudinal points] during the Term. [DEFINE “competing” – for example, could reasonably be expected to have material adverse effect on commercial standing and revenues of the Port or specify criteria in DPR]. A breach of this undertaking deemed to be a political force majeure event.]

13.9 [Performance Bonds: Concessionaire shall issue (or procure the issue) in the form of a first demand

bank guarantee (i) a “completion bond” of an amount of [...] on which the Contracting Authority may draw if the Concessionaire fails to comply with any of its material design and construction obligations; and (ii) a “performance bond” of an amount of [...] on which the Contracting Authority may draw if the Concessionaire materially fails to meet the level of services provided for in the Contract Documents.]

14. Change in law

14.1 Definitions.

(a) “Change in Law” (or “CIL”) [DEFINE] to include enactment of new laws, modification or repeal of existing laws, commencement of a law not yet in effect at Effective Date, change of interpretation or application of law, a Regulatory Change in Law [define] or a Loss of Permit [define to include amendments].

(b) “Qualifying Change in Law” is one which results in significant capital or operational expense for Concessionaire, or materially hinders or adversely affects it in the performance of its obligations or exercise of its rights under this Agreement, the Financing Documents of Project Contracts, reduces its revenues [or profitability] from the Project or necessitates a material changes to the Contracted Assets, the DPR, the design documents or this Agreement. Provided not attributable to a breach or fault of Concessionaire and not foreseeable at Effective Date. [REFINE AS APPROPRIATE, including any agreed thresholds (e.g., minimum cost of US\$ 50,000) or other relevant concepts (e.g., “specific” CIL).]

14.2 Consequences.

(a) Concessionaire to give notice of Qualifying CIL to Contracting Authority as soon as practicable, with reasonable detail as to its impact.

(b) If Qualifying CIL does not lead to service of Termination Notice below, the compensation provisions of Clause 15 apply.

(c) If Qualifying CIL renders Concessionaire unable to perform or exercise any of its material rights or obligations under this Agreement, the Financing Documents or Project Contracts, or renders them illegal or unenforceable, such that Concessionaire is deprived of the whole or a substantial part of the benefit thereof, Concessionaire may serve a Termination Notice. Parties then consult for a period of [90] days in attempt to agree changes to the Agreement which will mitigate the CIL to the Concessionaire’s reasonable satisfaction. If they fail to do so, the Concessionaire can proceed with termination.

(d) Acknowledged that these provisions do not extend to a Change in Law of general application in [host country] which do not amount to a Qualifying CIL. Each Party to bear the economic consequences thereof itself.

15. Force majeure

15.1 Definition. Any event or circumstance after the Effective Date which adversely affects or impedes a Party in the performance of its obligations or exercise of its rights hereunder and which is beyond the affected Party's reasonable control, was not reasonably foreseeable, and could not have been avoided or overcome with reasonable care/Good Industry Practice. Includes the events listed below (but only the Concessionaire can claim political force majeure) and those affecting the Concessionaire's subcontractors. [Identify specific exceptions, including late or defective performance by subcontractors, late delivery of plant equipment and insufficiency of funds, etc.]

15.2 Specific. Force majeure includes the following specific events meeting the above tests:

(a) Political force majeure. Events of the following kind provided not a reasonable response to the breach or omission of the affected Party:

- acts of war, insurrection, revolution, etc.
- blockade, riot, bombs, civil commotion, etc.
- political strikes/ industrial action, etc.
- decision or order of a court or Relevant Authority impeding performance
- failure or delay in granting a necessary licence, permit or consent
- cancellation, suspension, etc., of any necessary licence, permit or consent
- Qualifying Change in Law
- acts or omissions of the Contracting Authority (incl. breach of contract) or Government having a material adverse effect on the Project [or the Concessionaire's financial equilibrium]
- nationalisation, confiscation, requisition of the Port, Project, Contracted Assets, etc.
- Priority Services or Contracting Authority step-in rights
- [serious disruption or deterioration in [host country] political or economic situation adversely affecting Project or the availability of funds to finance it].

(b) Natural/ other force majeure ("OFM") includes the following:

- explosion, accident, breakage, etc.
- tidal variations, storms, etc.
- lightening, tempest, storm, etc.
- epidemic/pandemic or plague
- discovery on Site of archaeological finds, etc. [or adverse subsurface/ subaqueous conditions]
- third-party claims relating to acquisition, use or occupation of Site.

15.3 Procedure for Calling Force Majeure. Affected Party to send notice(s) to other Party as soon as practicable after occurrence of force majeure event, specifying nature of event, impact, steps taken to mitigate, estimate of duration, etc. Regular updates to be provided during continuance of event, at least monthly, together with facilities for site inspection, access to further information, etc.

15.4 Consequences. Force majeure period deemed to last from its occurrence (as notified) until its impact is no longer adverse. Further notice to be given on expiry. Parties to consult in good faith during continuance. Affected Party to use all reasonable endeavours in accordance with Good Industry Practice to overcome and mitigate adverse impact of event and resume performance of affected obligations as soon as practicable, and to use available insurance proceeds for this purpose. Obligations adversely affected by force majeure event are deemed to be suspended for its duration. Affected Party entitled to reasonable extension of time to any time-related obligations and (subject to Applicable Law) a reasonable extension of the Term to allow for impact.

15.5 Adjustments and Compensation for Force Majeure/Change in Law.

(a) If a Qualifying Change of Law or event of [political] force majeure occurs which causes Concessionaire to incur material cost, loss or expense, or otherwise has a material adverse effect on its commercial or economic standing or financial equilibrium (including anticipated Internal Rate of Return [DEFINE]) then Concessionaire entitled to give notice to Contracting Authority requiring that such changes or adjustments are made to the Agreement and/or its charges of tariffs, or such other steps are taken

- as may be necessary to enable it to continue performing its obligations and exercise its rights and
- to provide it with reasonable compensation for its costs, losses, expenses or other adverse effect

[such that it is left in the same net financial position as before and enjoys the same IRR][REFINE KEY TESTS AS APPROPRIATE]. No account taken of costs and losses covered by insurance.

(b) Changes, adjustments or other steps may include any of the following:

- extensions of time for performing obligations
- extension of the Term (subject to Applicable Law)
- changes to Concessionaire's tariffs or charges (subject to Applicable Law)
- changes to the nature or scope of the Services
- changes to the DPR or Project design
- [if above do not adequately compensate Concessionaire, [in the case of events of political force majeure], cash compensation payments by the Contracting Authority.]

(c) Parties' Representatives to meet following service of notice, to discuss and attempt to agree appropriate remedies. In assessing impact, due account to be taken of financial assumptions, cash-flow forecasts and IRR set out in financial plan attached to [DPR]. Financial Model it contains to be re-run to assist assessment. If Contracting Authority and Concessionaire cannot agree on necessary changes, adjustments or other steps within [SPECIFY PERIOD(S)], either Party can refer the matter for determination to Dispute Resolution Procedure (DSP) under Clause []. If determined under DSP that changes, adjustments or other steps cannot be made or taken to compensate Concessionaire adequately, [either Party/ Concessionaire] is entitled to terminate the Agreement.

15.6 Termination for Prolonged Force Majeure. If force majeure event continues such that affected Party is unable to perform its material obligations or exercise its material rights for a continuous period of at least [six] months, either Party is entitled to terminate the Agreement.

16. Default and termination

16.1 Concessionaire Defaults. The following constitute Concessionaire Events of Default entitling Contracting Authority to terminate the Agreement;

- (a) material breach of the Agreement by Concessionaire which remains unremedied for [180] days after notification from CA;
- (b) repudiation (etc.) of Agreement by Concessionaire;
- (c) appointment of provisional liquidator or equivalent

to wind up Concessionaire, unless notice set aside within 45 days;

(d) order or voluntary petition for winding up Concessionaire, except for purposes of amalgamation, reorganisation, reconstruction, etc. (subject to usual qualifications);

(e) Concessionaire abandons construction or operation of the whole or substantial part of the Port for a continuous period of [90] days;

(f) failure to pay Concession Fee due for at least [one year]

16.2 Contracting Authority Defaults. The following constitute Contracting Authority Events of Default entitling Concessionaire to terminate the Agreement;

(a) material breach of the Agreement by Contracting Authority [or Government] which remains unremedied for [180] days after notification from Concessionaire;

(b) dissolution, reconstruction or reorganisation of Contracting Authority in whole or part, on terms not reasonably satisfactory to Concessionaire and its lenders, which has a material adverse effect on its obligations or the rights of the Concessionaire hereunder or the enforceability of the Agreement's provisions;

(c) repudiation (etc.) of the Agreement by Contracting Authority;

(d) [failure to issue or procure the Operational Port Declaration within [three months] of construction completion];

(e) [termination of the Lease by the Contracting Authority];

(f) Performance of acts or occurrences listed in Annex [];

16.3 Consequences of Default. In an Event of Default occurs, the following termination procedures shall apply:

(a) Non-defaulting Party may initiate termination by delivering notice of intent to terminate to defaulting Party, specifying grounds relied on and any default, copied to the Lenders.

(b) Defaulting Party then has a Remedy Period of [180] days from date of notice to rectify Event of Default, to the reasonable satisfaction of the non-defaulting Party. Can continue to make efforts to rectify during Remedy Period; non-defaulting Party must not interfere or obstruct. Parties to continue performing all other obligations.

(c) Lenders also entitled to procure or assist with rectification of Concessionaire Event of Default during Remedy Period, and to pay any amounts outstanding to Contracting Authority (with interest at default rate), in accordance with the terms of their Direct Agreement.

(d) If Event of Default (or other ground of termination) is rectified or ceases to apply, or non-defaulting Party is satisfied with rectification steps being taken, during Remedy Period, the notice of intent to terminate shall be withdrawn.

(e) If not, the non-defaulting Party may terminate the agreement by giving defaulting Party a further Termination Notice of [180] days, copied to the Lenders. At the end of such period, unless the Lenders have exercised their substitution rights under the Direct Agreement, this Agreement shall stand terminated.

(f) In connection with any termination or expiry of the Agreement, Contracting Authority is entitled to serve a Transfer Information Notice, requiring Concessionaire to provide all relevant information, data and records relating to the Port, the Contracted Assets, its business, etc., to the Appraising Team under sub-clause (g) to enable the condition survey to be carried out.

(g) Following service of a Termination Notice, Lenders entitled to take steps to bring in a substitute entity ("NC") to take over the rights and obligations of Concessionaire in its place, in accordance with the detailed procedures specified herein and in the Direct Agreement, including consultation and provision of all relevant information. [SPECIFY] Lenders entitled to effect substitution if NC has the necessary management capabilities, competence and resources for the role, subject to Contracting Authority's reasonable approval. Contracting Authority to provide all reasonable assistance throughout this process. If approved, this Agreement, the Lease and all the Project Contracts and documents shall be novated to NC. If the Lenders fail to effect and complete such substitution by the expiry of the Termination Notice period, termination goes ahead.

(h) Parties to appoint an Appraising Team in the event of any termination or expiry of the Agreement, to carry out a condition survey of the Contracted Assets and the Port and determination of any Final Compensation payable, consisting of a port and harbour engineering expert, a transport economist and a financial expert. [SPECIFY PROCEDURE with fallback mechanism for appointment by independent firm of international repute failing agreement of the Parties.]

17. Transfer obligations and compensation payments on termination

The following provisions apply on any termination or expiry of the Agreement:

17.1 Scope of Transfer. Concessionaire to hand over use, control and occupation of the Site, the Contracted Assets and the permanent facilities comprised therein, and transfer the following assets necessary to operate and maintain the Port to Contracting Authority:

- (a) all land and buildings
- (b) plant and machinery
- (c) spare parts
- (d) deeds and documents necessary to transfer legal interests
- (e) benefit of any unexpired insurance, guarantees, warranties, etc.
- (f) all designs, maps, plans, technical documents, manuals, etc.
- (g) any port User Agreement and other agreements which the parties have agreed should survive termination
- (h) all rights to operate, maintain and use the Port and provide the Services

To include tangible and intangible assets but exclude Concessionaire's own existing business assets such as cash, investments, loans, book debts, tax refunds, receivables, etc. (unless paid for by CA). All property comprised within the Site [and the Lease] shall revert to Contracting Authority free of any encumbrances. No Ancillary Facilities to be removed that represent integral part of Project. Concessionaire required to remove all staff, personal property, movable assets, etc., not required to be transferred within three months. Assets to be transferred by Concessionaire at its own cost and in good working condition (subject to normal wear and tear), free of any security interests or outstanding liabilities. Contracting Authority responsible for all costs of management, operation and maintenance of Port following transfer.

17.2 [Amounts Payable on Termination. The following principles shall apply to calculation of any asset valuations and amounts payable on termination of the Agreement (as the same may be refined or developed in the DPR/ Annex []):

[NB there are many different ways of approaching this subject. the following summary represents one possible approach]

(a) Expiry of Term. No amounts payable (except as agreed otherwise);

(b) Termination before Expiry of Term. Amounts payable by Contracting Authority to Concessionaire determined on following basis:

a. During **Development Period**.

i. Termination resulting from Qualifying CIL, political force majeure or Contracting Authority Default: recover full audited Development Costs [as defined];

ii. Termination resulting from Concessionaire Default: no recovery;

iii. Termination resulting from OFM/ prolonged force majeure (including failure to achieve Financial Close by Long Stop Date: recover 50 per cent audited Development Costs up to maximum of [US\$].

b. During **Construction Period**.

i. Termination resulting from Qualifying CIL, political force majeure or Contracting Authority Default: recover all sums actually spent on developing and implementing Project up to that date (including Development Costs, design and construction costs, financing costs, advisory fees, etc.), plus a premium of [15 per cent] to compensate for the Concessionaire's loss of profit;

ii. Termination resulting from Concessionaire Default: all sums actually spent on developing and implementing the Project (as in i above) but without premium and LESS any amounts Contracting Authority is entitled to deduct or offset as provided below (e.g., to rectify Concessionaire breach or redo defective work) but PROVIDED that deductions do not reduce compensation below the [amount/[] per cent] of outstanding Financing Obligations;

iii. Termination resulting from OFM/ prolonged force majeure: [all]/[] per cent of] sums actually spent on developing and implementing Project (as in i above) but without any premium, and NOT LESS than [[] per cent] Equity Invested (define) plus Financial Obligations.

c. During **Operational Period**.

i. Termination resulting from Qualifying CIL, political force majeure or Contracting Authority Default: the fair market value of the Equity Invested (calculated in accordance with Annex []) plus the Financial Obligations (if any) together with a premium of [15 per cent] of all future anticipated revenues for the remainder of the Term as indicated in the Financial Plan;

ii. Termination resulting from Concessionaire Default:

as in i above, but without any premium and LESS any amounts Contracting Authority is entitled to deduct or offset as provided below PROVIDED that deductions do not reduce compensation below the [amount/[] per cent] of outstanding Financial Obligations;

iii. Termination resulting from OFM/ prolonged force majeure: [[] per cent of] the fair market value of the Equity Invested (calculated in accordance with Annex []) plus the Financial Obligations (if any) and without any premium.

(c) Procedure and Final Amount. Sums notionally payable calculated in [] currency as provided above [and in Annex []]. Contracting Authority then entitled to deduct any outstanding penalties or damages due or losses suffered as a result of from Concessionaire breach (but not below amount of Financial Obligations) and any insurance proceeds payable to Concessionaire in respect of termination, to reach Final Compensation Payable. Calculations to be made by Appraising Team. Final Compensation Payable by Contracting Authority in accordance with Clause 18. Express termination provisions hereunder are exhaustive (but without prejudice to any accrued rights and liabilities of the Parties at such time).

18. Transfer procedures on termination

The following procedures and provisions apply on any termination of the Agreement

18.1 Procedure and Condition of Assets.

Concessionaire obliged to hand over the Contracted Assets and control and occupation of the Site and the Port to the Contracting Authority, in a fit state and condition for it to continue operating them for a notional period of at least [5/10] years (or as specified in DPR). Concessionaire obliged, during a [two-] year warranty period, to return to Site and rectify defects in assets which do not meet the specified standard. Contracting Authority must also operate and maintain assets to the contracted standards. Scope of assets to be transferred and any payments to be determined as provided above.

18.2 Condition Survey and Calculations. Transfer Information Notice to be issued at least [six] months before due date of expiry or termination. Concessionaire to procure condition survey of the Contracted Assets and the Site by the Appraising Team, to ascertain condition of the facilities, etc., and whether they meet the hand-over requirements of the Agreement, and to calculate compensation payments due (acting as expert not arbitrator). Parties to provide reasonable assistance to/cooperation with Appraising Team, including access to relevant records and documents. Costs borne equally by them.

Appraising Team to issue report within three months of appointment. Conclusions subject to challenge through dispute resolution procedure.

18.3 Final Compensation Payable. To be paid within 60 days of Appraising Team report or resolution of any dispute (unless longer period agreed by Parties), failing which Concessionaire can continue operating Port and receiving revenues for up to a further [two years] (but without prejudice to its rights to Final Compensation Payable with interest at default rate). Contracted Assets and Port to be transferred by termination or expiry date (save as aforesaid). Parties can agree on deferred/stage payment arrangements if they choose.

18.4 Training. Designated key personnel of Contracting Authority to be trained by Concessionaire's personnel for six months prior to termination/ hand-over date to facilitate smooth transfer.

18.5 Final Certificate. Parties to confirm completion of transfer and hand-over procedures and payments by signing certificate to that effect.

19. Insurance

19.1 Insurance Required. Concessionaire obliged to insure the Contracted Assets and its activities as from Construction Commencement Date with reputable national/international insurers in accordance with Good Industry Practice, including the policy categories specified in the DPR, on such detailed terms as Concessionaire reasonably considers necessary/ appropriate and consistent with the Financing Documents (subject to market availability on reasonable commercial terms). Contracting Authority to be kept properly informed, receive copies of policies and notified of any cancellation or lapse. Concessionaire must also submit annual insurance report.

19.2 Application. Subject to the Lenders' requirements, insurance proceeds in respect of physical damage and interruption of operations to be applied for reconstruction making good lost revenues.

20. Law and disputes

20.1 Arbitration. Except where (if at all) the Agreement provides for final determination by an Expert, all disputes, claims or difference between the Parties arising out of or in connection with this Agreement, including with respect to its existence, performance, breach, termination, validity or interpretation (each a "Dispute") shall be referred to

and resolved by the Dispute Resolution Procedures herein. Disputes shall be referred initially to Parties' representatives, who shall meet and discuss them within [30] days of notice at [location] in attempt to resolve them. Failing agreement within [90] days, either Party may refer any dispute for final determination to [arbitration] under [SPECIFY SYSTEM (e.g., ICC/LCIA/ ICSID)][the courts of host country]. The place of arbitration shall be [] and the language []. [SPECIFY NO. OF ARBITRATORS AND ANY OTHER PROCEDURAL SPECIFICS]

20.3 Governing Law. The Agreement shall be governed and construed in accordance with laws of [host country].

21. Assignment

Neither Party may assign or transfer its obligations or liabilities under the Agreement without the consent of the other [not to be unreasonably withheld]. However, Concessionaire may freely assign the benefit of its rights by way of security to its lenders for the purposes of raising funding for the Project (subject to Applicable Law). All without prejudice to the Lenders' step-in and substitution rights set out in Clause [].

22. Representations, warranties and sovereign immunity

22.1 Reps and Warranties. [INSERT AS APPROPRIATE FOR EACH PARTY. To include capacity and standing, power and authority, due execution and authorisation, valid, binding and enforceable obligations, no immunity from legal process, no conflict with other documents, no existing claims or proceedings which could materially prejudice Project, etc.]

22.2 Waiver of Sovereign Immunity. [STANDARD WAIVER] Contracting Authority [and Government] unconditionally and irrevocably waive[s] any sovereign or governmental immunity from suit or legal process to the maximum extent permitted under Applicable Law, such that the Agreement's provisions can be treated as private commercial acts fully enforceable in accordance with their terms, etc. Consents generally to the bringing and enforcement of proceedings, judgments or awards against it and relief and remedies granted, etc.

23. Indemnities

[INSERT AS APPROPRIATE for example, against third-party claims resulting from breach of contract]

24. Miscellaneous

[STANDARD LEGAL BOILERPLATE incl. entire agreement/ amendments/ no waiver/ severance of terms/ language/ notices/ confidentiality/ Interest on late payments/ further assurance, etc.]

[EXECUTION CLAUSES]

Appendices

An indicative list of Appendices and their contents might include:

1. The detailed project report (“DPR”)

[Containing key technical specifications (“output spec.”), design and construction parameters, maintenance standards and replacement schedules, operational procedures, KPIs (Key Performance Indicators), international “best practice” standards and relevant EBRD/IFI requirements in this context. May also include certain central commercial requirements that could not be finalised at the time of signature of the agreement – e.g., phasing, tax/duty exemptions/competition restrictions, etc.]

2. Contracted assets

[List of assets to be provided/ installed/ deployed by Concessionaire, indicating ownership, temporary or permanent nature and whether to be included in Transfer procedures (hand-over). (The latter may become a distinct category of “Core Assets”). NB may be combined with DPR.]

3. The site

[Exact description with maps/diagrams of land constituting the Site, indicating layout of Port, means of access and egress, location of utilities and transport infrastructure linkages, etc. May distinguish between initial land required as CP to Construction Commencement and after-acquired land to be added in subsequent Phases. The hand-over of the Site to the Concessionaire may also be phased if Site acquisition is a complex process.]

4. [The lease]

[Pro-forma lease of Site to be included if needed]

5. Financial model

[Concessionaire’s Financial Model may be attached to Agreement, especially if it needs to be re-run to help indicate impact of certain events with consequences

under the Agreement – for example, “financial balance” provisions where force majeure/CIL clauses come into play].

6. Permits and consents

[List of identified permits and consents known to be needed for the Project, showing the stage at which they must be obtained and the parties’ respective responsibilities for obtaining them (primarily the Concessionaire, but in some cases perhaps also the Contracting Authority – for example, in the case of any ratification of the Agreement or the Operational Port declaration)].

7. Expert committee

[Often a formal monitoring and “interface” body representing both parties, to discuss questions and issues, ensure communications are properly addressed and received, etc.]

8. Monitoring of design, construction and operations stage

[Supervisory procedures. Contracting Authority’s rights to supervise, inspect and monitor the design and construction works, and subsequently the maintenance and operations activities. May set out any and all specific rights of approval. Documents to be provided/ timing/ level of detail, etc. Access to be granted. Description of any Site office for CA representatives. Pro-forma monitoring and information chart.]

9. Services

[List of Services to be provided by the Concessionaire during the Operational Period. There may be some negotiation about their level of detail in this Annex. The Concessionaire will want a degree of flexibility to re-plan, reorganise, modify or even cancel them. But the CA will have a statutory duty to ensure that any “services of general interest” to the public are being provided, and to appropriate standards. A comprise might be to distinguish between “essential” and “other” services. A separate list of applicable “cargo restrictions” may also be included here.]

10. Tariffs

[Include any specific provisions relating to the tariffs to be charged to (public) users of the Port – for example, amounts/ calculation/ revisions – and the rights of approval of the CA to any changes to them. See Commentary on this subject. Law in effect may require the CA to approve all of them, especially in civil law

jurisdictions. In some countries, though, there may be no such automatic power and the CA may be content to let market forces apply, in which case the Annex may be omitted altogether.]

11. Ancillary facilities

[List (non-exhaustive) of facilities which may be developed, installed and used by or on behalf of the Concessionaire during the Term in addition and adjacent to the Contracted Assets – for example, certain warehousing/ factories/ storage, restaurants/ shops/ fuelling stations, etc.]

12. List of insurance

[Categories of insurance required to be obtained by Concessionaire and any minimum amounts. Some will be essential from the CA's point of view – e.g., physical damage and third-party liability; others may be optional and not even require listing – e.g., business interruption/ political risk/ directors' liability].

13. List of material third-party contracts

[List certain third-party contracts over which CA may have certain rights of review or approval, or which the Concessionaire may not amend without its consent. Likely to include EPC Contract, perhaps any separate agreement with Design Consultant and any principal O&M Contract (periodically updated).]

14. [Termination events]

[List of specific occurrences or statutory powers which may trigger termination of Agreement. See Clause 16.2(f). Designed to capture very specific areas which Concessionaire may be concerned about, but which cannot be precluded by contract. Usually, the general provisions of the termination clause will be sufficient, however].

15. Termination compensation

[Include any more detailed methodology supporting calculation of termination payments, such as calculation of future revenues where early termination occurs during Operational Period, or methodology for calculating market value of equity or assets. NB Another accepted approach to termination compensation is to take Book Cost/ Depreciated Historical Cost/ Depreciated Base Cost as the basis of calculation, in which case it would be helpful to insert agreed guidelines here.]

16. [Dispute resolution]

[Include any specific provisions or procedures that may need to be set out in the Agreement – for example, a mediation mechanism, specific details (if any) relating to the arbitration procedure and the procedures applicable to any expert determination of disputes, such as those including an Expert Panel.]